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THE NEED OF EXTENDING THE CRIMINAL JURISDICTION OF THE FEDERAL COURTS TO CHESAPEAKE BAY AND OTHER SIMILAR GREAT BODIES OF WATER.

IN DECEMBER, 1913, an oyster boat left Norfolk for a Chesapeake Bay port in Maryland, manned by a captain and two deck hands. A few days later the boat was found, adrift and abandoned, in Chesapeake Bay. Investigation showed that a murder had probably been committed, since the furniture and bedding in the cabin were broken and smeared with blood. Some weeks later the body of the captain was found floating in the Bay, with marks showing that he had been murdered and cast overboard. A large sum of money which the captain had on his person was missing, and a small skiff belonging to the equipment of the larger boat had been used by the murderers in their escape.

The matter was brought to the attention of the writer, as United States Attorney for the Eastern District of Virginia, by the Commonwealth's Attorney of Accomac County, Virginia, opposite which county the abandoned boat had been found, with the request that the matter should be placed in the hands of the United States Marshall, to the end that the greater powers of the Federal Government might be exerted in apprehending the murderers and bringing them to trial in the Federal Court. Upon investigation of the subject, it was found that the Federal Court had no jurisdiction of the crime of murder committed on Chesapeake Bay, and the question then arose as to where the defendants should be tried in the event of their apprehension.

In this particular case there were no witnesses to the commission of the crime; and, on account of the influence of the wind and tide, the location of the boat, at the time of its discovery, could furnish no guide as to its location at the time of the commission of the offense. Whether the murder was com-

mitted within Virginia or Maryland waters, could be determined only by the testimony of the accused themselves; and if committed in Virginia waters, within what county, was likewise a question which could only be answered by the accused.

This anomalous situation suggests the desirability of legislation by Congress extending the Federal criminal jurisdiction to offenses committed on such bodies of water as Chesapeake Bay, and the necessity of this was further emphasized upon a cursory examination of the police records of Norfolk, which showed the dismissal for lack of jurisdiction of numerous cases of larceny, assault, maiming and other offenses committed on the steamships plying between Norfolk and Baltimore. In most of the latter instances, it would have been possible to approximate with reasonable accuracy the point of land opposite which the offense was committed, and under the laws of the States of both Maryland and Virginia, the offenses would have been properly triable in the counties of the respective states opposite to which they occurred, but as a practical matter, this was never done. The officials of the counties in question were not interested in such offenses, and particularly was this true when the expense of sending for and bringing prisoners from Norfolk or Baltimore to such counties for trial was considered. Hence it is that for such offenses the offenders have had practical immunity.

It is believed that, although not generally known or appreciated by the bar, there is, in the first place, no doubt of this lack of jurisdiction in the Federal Criminal Courts, and, in the second place, likewise no doubt of the power of Congress to confer the jurisdiction upon the District Courts.

Chapter 11 of the Federal Criminal Code,¹ as now existing, which defines all the offenses within the admiralty and maritime jurisdiction of the United States, excepting piracy and other like crimes, confines the jurisdiction of the Federal Courts to those offenses committed:

First: Upon the high seas;

Second: On any waters within the admiralty and maritime

¹ Sec. 272, *et seq.*, U. S. Comp. Stat. '16, p. 12,871, *et seq.*

jurisdiction of the United States *and out of the jurisdiction of any particular state*; and

Third: Upon a registered vessel of the United States on a voyage upon the waters of the Great Lakes.

The third ground may be eliminated from this discussion, and it is therefore apparent that, unless the words "high seas" include the waters of Chesapeake Bay, or unless such waters are "not within the jurisdiction of any particular state," the Federal Courts have no jurisdiction.

From the earliest times Virginia has claimed exclusive ownership of the waters of Chesapeake Bay between the Virginia capes and a line drawn nearly east and west at a point about opposite the mouth of the Potomac River, and Maryland has claimed exclusive ownership of the waters of Chesapeake Bay above that point. This claim to ownership was first publicly recognized in a compact made between the states of Maryland and Virginia in 1785, and was at a later time more perfectly defined by an agreement between the two states, made in 1877.² During the intervening period Virginia and Maryland have regularly claimed jurisdiction over the waters of Chesapeake Bay, and the legality and constitutionality of the agreement of 1785 was distinctly recognized by the Supreme Court of the United States in the case of *Wharton v. Wise*,³ a case involving the taking of oysters in Chesapeake Bay in which the Supreme Court upheld legislation by Virginia. To the same effect is the case of *Smith v. Maryland*.⁴ It is impossible to read the opinions in the two cases cited without fully recognizing that, both by a compact between the two states in question and by judicial determination, Chesapeake Bay is recognized to be within the jurisdiction, as to the respective parts mentioned, of Virginia and Maryland; and hence the limitation in Chapter 11 of the Federal Criminal Code, of jurisdiction to offenses committed on waters out of the jurisdiction of any particular state would exclude jurisdiction over the waters of Chesapeake Bay,

² The two compacts referred to are copied in full in 1 Pollard, *Code of Virginia*, 1904, sec. 13.

³ 153 U. S. 155 (1894).

⁴ 18 How. 71 (1855).

as well as the other great partly inland waters lying along the Atlantic coast, e. g., Narragansett Bay, Long Island Sound, Delaware Bay, etc.⁵

In *United States v. Rodgers*,⁶ the Supreme Court held the term "high seas" as descriptive of or applicable to the waters of the Great Lakes, using in that connection the following language:⁷

"It is true that lakes, properly so called, that is, bodies of waters whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times, in all directions, and border on different nations or states or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called."

This description of what is included within the term "high seas" so aptly corresponds with conditions obtaining in Chesapeake Bay, that it might seem to be authority for claiming jurisdiction under that portion of Section 272 which gives Federal Courts jurisdiction of all crimes committed upon the "high seas." But that the Chesapeake Bay is not the "high seas" was distinctly held in the Court of Commissioners of Alabama claims. In the Act of June 5th, 1872, re-establishing this Court, it was provided that the tribunal should receive and examine certain classes of claims resulting from damage done on the *high seas* by Confederate cruisers. In the case of *Stetson v. United States*,⁸ a claim was made under this class for the destruction in October, 1862, of the ship *Alleghanean* in Chesapeake Bay, by a Confederate naval force. Passing upon the question of whether the Chesapeake Bay was the "high seas," the Court made this statement:

⁵ *United States v. Bevans*, 3 Wheat. 336 (1818).

⁶ 150 U. S. 249 (1893).

⁷ At p. 266.

⁸ No. 3993, Class 1.

"Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked and are twelve miles apart, that it is, and its tributaries are, wholly within our own territory, that the boundary lines of adjacent states encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it can not become the pathway from one nation to another; * * * we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the government of the United States, and no part of the 'high seas,' within the meaning of the term as used in Section 5 of the Act of June 5th, 1872."

Whether this adjudication is authority in all cases for denying to the Chesapeake Bay the term "high seas," we do not pretend to say, but, taken in connection with all the other authorities on the subject, it seems to be perfectly clear that an amendment to Section 272 of the Penal Code will be necessary, in order to give Federal Courts jurisdiction of crimes committed on these waters.⁹

The Federal Courts of Maryland and Virginia seem to have recognized this lack of jurisdiction of crimes committed on Chesapeake Bay and tributary waters, and have invariably remanded such cases as have been brought before them to the proper state courts for trial.¹⁰

That it is within the power of Congress to include within the criminal jurisdiction of the Federal Courts crimes committed under such circumstances, there can be no doubt. In the report of the Commission to revise and codify the criminal and penal jurisdiction of the United States,¹¹ the Commission recommended the enactment of a provision authorizing the trial by the Courts of the United States of parties charged with offenses committed on the following waters:

⁹ *United States v. Wilson*, 3 Blatchf. 435, Fed. Cas. 16,731 (1856); *United States v. Grush*, 5 Mason 290, Fed. Cas. 15,268 (1829); *United States v. Robinson*, 4 Mason 307, Fed. Cas. 16,176 (1826).

¹⁰ *Ex parte Ballinger*, 88 Fed. 781 (1882).

¹¹ Senate Document No. 68, part 2, 57th Congress, 1st Session.

"The seas bordering on the United States within a distance of one marine league from the shore, or in any river, haven, creek, basin, or bay immediately connected with such seas, Lake Michigan, and the Straits of Mackinac, and the waters of Lake Superior, St. Mary's River, Lake Huron, River St. Clair, Lake St. Clair, Detroit River, Lake Erie, Niagara River, Lake Ontario, and the River St. Lawrence, to the middle of such waters."

And the report proceeds as follows:

"There does not seem to be any doubt that Congress may establish the jurisdiction of the Federal Courts over offences committed in the waters here specified, without respect to the ownership or registry of the vessel upon which the crime was committed, and it is stated that such jurisdiction may properly be assumed."

And, again, the Commissioners further say:¹²

"There are three constitutional sources of the authority of the federal government over offenses upon the seas:

(1) The power of Congress 'to regulate commerce with foreign nations;'

(2) The power of Congress 'to define and punish piracies and felonies committed on the high seas and offenses against the law of nations;'

(3) The extension of the judicial power 'to all cases of admiralty and maritime jurisdiction.' "

Mr. Benedict, defining the extent of the jurisdiction conferred under paragraph 3 above, says,¹³ "The effect of such language is to give the court cognizance of all maritime affairs, civil as well as criminal. Maritime, relating to the sea." And speaking of the etymology of the words, "admiralty and maritime jurisdiction," he says: "They include the judicial jurisdiction of the admiral and of all maritime causes arising from things done upon and relating to the sea." The *Bevans* case¹⁴ itself suggests that Congress has such jurisdiction, the opinion being predicated upon the failure of Congress to assert this constitu-

¹² On p. 25 of the report.

¹³ BENEDICT, *ADMIRALTY*, 3 ed.

¹⁴ *Supra*.

tional power. Ample authority may be cited in support of the above.

Unfortunately, however, in the report filed by Judge Moon on January 6th, 1908, with H. R. 11701, speaking of the report of the Commission, he uses the following language:¹⁵

"The Commission, at page 1829, Column 2, of its report, has undertaken to name specifically every water to which the admiralty and maritime jurisdiction extends, and has then provided that certain acts committed on any such waters shall be crimes, etc. While the plan of the Commission is a great improvement on the existing system, or want of system, it is open to the objection that the list may possibly not include every place within such jurisdiction. Therefore, your Committee has agreed upon what seems to it to be a brief general description which comprehends every water to which admiralty and maritime jurisdiction extends."

Then follows the language identical with the present law, and which contains the same proviso found in the old law, namely, "and out of the jurisdiction of any particular State." The necessary effect of the inclusion of this was to limit the jurisdiction of the United States to crimes committed either on the "high seas" or on waters out of the jurisdiction of a particular State, and hence to exclude from such jurisdiction every body of water save the oceans and the Great Lakes.

It would seem that the language, as quoted by the Commission, would have met the difficulties and embarrassments which both the Committee and the Commission pointed out in their respective reports, but by leaving the language of the Section¹⁶ as it is in Paragraph 1, and by including specifically the waters of Chesapeake Bay, Delaware Bay and other great bays along the eastern seaboard, along with the Great Lakes in Paragraph 2, we would meet the situation under discussion.

In Chapter 12 of the Criminal Code,¹⁷ the offenses there condemned and which relate entirely to the seas, the language

¹⁵ At p. 9.

¹⁶ Sec. 272 of the Federal Criminal Code.

¹⁷ Sec. 280, *et seq.*, U. S. Comp. Stat. '16, p. 12,911, *et seq.*

conferring jurisdiction is "on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States," omitting the sentence (included in Section 272), "and out of the jurisdiction of any particular state." The offenses treated in Chapter 12 relate to piracy, mutiny, etc., and not to murder, ordinary assault, larceny, or such like offenses, which are entirely dealt with in Chapter 11.¹⁸

The reasons heretofore given, relating to the necessity of such legislation as is suggested, will, we feel confident, appeal to the authorities of Virginia and Maryland and the other sea-board states, and will meet with no opposition from any quarter. The cost of the trial of cases occurring in the counties of the State, in the case of offenses committed on the waters opposite them, has imposed a serious burden upon these counties which they are loath to assume, and this fact, together with the difficulty of determining the jurisdiction, has created a condition of immunity for offenses committed upon such waters.

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¹⁸ Sec. 272, *et seq.*